Recent Publications

Global Constitutionalism and Democracy

Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism. By Peter C. Caldwell. Durham, NC: Duke University Press, 1997. Pp. xiv, 300. Price: $ 17.95 (Paperback). Reviewed by Guenther Auth.

After Germany's unification within a common constitutional framework in 1871, the construction of the constitutional subject's identity was paralleled by two interrelated but distinguishable processes: an ongoing normative discourse about the state and its formal and substantial organization through a constitutive process, and practices of conservative classes that played a crucial role in the failure of the Hanoverian movements for democratic reform in the 1830s, the unsuccessful Revolution of 1848, and the Prussian constitutional conflict of 1862–66. The "failure" of subsequent attempts to create a state based on popular sovereignty instead of a constitutional monarchy occurred because German Pandectist theorists of the *Rechtsstaat* placed their thrust in the form of law, not in majority rule. Closely related thereto, the politically influential conservative and liberal classes were opposed to the principle of democracy because they considered popular sovereignty a threat to the evolving German state. Accordingly, the established constitutional framework placed society in a system of justice in which law was to be made by the political sovereign. A conception of positive law comprised of the constitutional document and correctly produced statutes that were to be codified from above came to dominate German constitutional legal thought and political practice.

In *Popular Sovereignty and the Crisis of German Constitutional Law*, Peter C. Caldwell neglects this context in his examination of the development of what he calls a new constitutional jurisprudence during the Weimar Republic. The aim of his book is to show that, contrary to what he portrays as the general contemporary view of the key negative role of the Weimar Constitution in the German Reich, Weimar constitutional lawyers managed to break away from the "statist"/"statutory" positivism that predominated in the weak postwar republic whose citizens increasingly opposed the conservative values of the Weimar Constitution.

In his account of the beginning of interwar German constitutional legal thought, Caldwell sets out the main features of the dominant "statist" positivist tradition in German state law from the turn of the century and aptly describes its importance for scholars like Richard Thoma and Gerhard Anschutz. Both were to become leading representatives of a new school of "statutory" positivism that was founded on a specific method of interpreting statutes, understood as the highest expression of the state's will, through concepts such as "dominion" and "contract." Although they began to emphasize statutes more, they still followed

Laband's "statist" positivism that saw all law as an act of will by the state and thus changeable according to the state's will. Laband's conception of law became the dominant approach in the German Empire, and, within this general approach, the statute was the linchpin for the entire political system of constitutional monarchism. In this system, there could be no judicial review. Judgment was left to the highest state organs—i.e., the monarch and the national assembly. The judges' duty was only to apply laws, not to review them for their conformity to constitutional norms.

As Caldwell rightly mentions, criticism of the Laband school existed prior to the Weimar Republic but gained significant ground only with the fall of the Bismarckian empire in 1918. Among the first antipositivist legal critics were Hermann Kantorowicz and Eugen Ehrlich—members of the so-called Free Law Movement—who emphasized the extralegal and often extralogical aspects of a judicial decision and who questioned the possibility, even the desirability, of the positivist model of applying norms. The more influential critics of Labandian "statist" positivism, however, turned out to be scholars like Rudolf Smend and Hermann Heller, who developed extensive theories of constitutional practice, and Carl Schmitt and Hans Kelsen, who advanced opposing views of the theoretical and political foundations of constitutional systems.

The sections dealing with Schmitt's and Kelsen's conflicting jurisprudential approaches are the centerpiece of Caldwell's book. It was this dispute that was partly a result and paradigmatic of the traditions underlying German legal thought since the nineteenth century. It is one of the strengths of Caldwell's book that a reader not only learns the basic assumptions and arguments of both scholars' constitutional theories but is also introduced to the issue that sparked dispute among them: the question of how to conceive of the constitution as the foundation of the state. The incommensurable positions in a broader spectrum of scholarly theories were Kelsen's neo-Kantian positivism based on the notion of the constitution as the "basic norm" from which all other norms in the legal system could be logically derived and Schmitt's insistence that the constitution as a political statement of will posited by the sovereign was not merely a necessary logical assumption but rather a transcendent, metaphysical fact.

Caldwell's book is a sophisticated account of the political and legal aspects involved in the shaping of Germany's interwar constitutional identity. The object of his study is not primarily black letter rules, the authoritative text of the constitutional document, or the function of rules, but approaches of different jurisprudential schools and a variety of scholarly views and their correspondence to a politically charged environment. In this respect, Caldwell succeeds in illustrating many of the subtleties that were involved in the gradual shift from a "statist" to a "statutory" positivism and thoroughly analyzes its implications for the "jurisprudence of values" characteristic of the ongoing debate about the German *Grundgesetz*. In highlighting crucial issues in the controversy between Kelsen's positivism and Schmitt's political theory of the Constitution, Caldwell gives a thorough picture of the resurgent problems in Weimar Germany's jurisprudential thought. There can be no doubt that this is a remarkable achievement

that renders Caldwell's book highly rewarding. Nonetheless, there are some flaws that should be mentioned.

What Caldwell portrays as the "new jurisprudence" of the Weimar Republic does not necessarily seem new in light of the history of German legal and jurisprudential thought. The conception of law of the so-called Historical School of Friedrich Karl Savigny already comprised two aspects that coexisted in an uneasy tension: a formal aspect that sought clarity, precision, and logical exactitude, and a material aspect that saw law as an organic outgrowth of the underlying culture. The tension between these two aspects was to become a brooding omnipresence that hovered over all subsequent German legal thought, as is aptly described in Caldwell's account of, on the one hand, the forms of positivism from Laband to Anschutz and Thoma and even Kelsen, and, on the other hand, forms of antipositivism that were to be found among the proponents of the Free Law Movement and, although in a substantially different manner, Carl Schmitt.

It also would have been helpful for a better understanding of the pursuit of conservative values in the political process and the complexities involved in the shaping of a German constitutional state to learn more about the conceptual dialectic between liberalism and democracy. The sharp opposition between liberalism, which stood for the greatest possible freedom for the individual, and democracy, which was considered a form of absolute despotism, was one of the most characteristic features of German political thought in the nineteenth century. This dichotomy can be traced back to the influential teachings of Kant, who, in the wake of the excesses of the French Revolution, classified untrammeled majority rule as a form of despotism.

In sum, the weakness of Caldwell's book is that he refers to important political and legal issues that are to be understood in light of a broader historical context. The price is that a reader unfamiliar with nineteenth-century German legal thought and philosophy will not be able properly to understand the particularities of the development of German constitutional jurisprudence. It would have been useful to consider the extent to which Savigny's Historical School, Kantian thought, and, above all, the versions of neo-Kantian philosophy were constitutive elements of modern German legal thought. The author's failure to build and elaborate on such historical and philosophical issues is, however, among the most widespread barriers to an adequate understanding of a foreign legal system and jurisprudential culture.

Political Participation in Beijing. By Tianjian Shi. Cambridge, MA: Harvard University Press, 1997. Pp. xv, 334. Price: $49.95 (Hardcover), $29.95 (Paperback). Reviewed by Colin Chow.

On June 4, 1989, Chinese government troops stormed into Beijing's Tiananmen Square, unleashing gunfire and imposing martial law on the peaceful masses gathered there to demonstrate for democracy. This tragic event crystal-

lized in the minds of many observers the belief that the government of the People's Republic of China (PRC) actively and violently restricts its citizens' political activity. Conventional political models have assumed that in China, or in any country governed by a totalitarian Communist regime, political participation amounts to little more than a superficial state-mobilized effort to legitimize its own authority. Is this an accurate assessment? Using data gathered from the first scientific survey of political participation in China, Tianjian Shi, assistant professor of political science at Duke University, reevaluates these traditional perceptions in his book *Political Participation in Beijing*.

From late 1988 until early 1989, when the Tiananmen incident prematurely terminated his survey, Shi employed sophisticated sampling techniques in an attempt to ascertain the avenues of political involvement that citizens in Beijing used to articulate their interests. The results of this survey form the statistical basis for *Political Participation in Beijing*.

Shi begins his analysis by distinguishing twenty-eight forms of citizen participation in Beijing. These range from more apparent modes of participation such as elections and demonstrations to subtler activities ranging from scandalous gossip to letter writing. For each participatory form, the author provides impressive documentation, interspersing examples of historical precedent and current usage with direct quotations from survey respondents. After assigning each form a quantitative value for the initiative required, the risk involved, and the potential for conflict, Shi enters these numbers into a "direct oblique rotated-pattern matrix." Seven discrete patterns of political participation emerge: voting, campaign activities, election boycotts, appeal and adversarial activities, resistance, and cronyism. Applying regression analysis, Shi quantifies the extent to which disparate factors such as age, living quarters, and parents' education level affect the decisions of Beijing citizens to participate in each of these seven categories of political activity.

Shi arrives at the surprising conclusion that political participation in Beijing is no less common than in many other countries, although the methods and objectives of participation may differ greatly. In fact, only one-tenth of the population abstains entirely from any political activity. Shi attributes the dissimilarities he finds to China's unique institutional settings, arguing that the organizational structure of the Chinese bureaucracy determines how and when citizens participate in the political process. Rather than relying on narrow and immutable laws to communicate its directives to subordinate levels of bureaucracy, the PRC central government depends on broadly constructed documents that confer upon local government officials a high degree of discretion in implementing policy. This bureaucratic latitude represents the best opportunity for the average citizen to influence government action. Drawing a distinction between "high politics" versus "low politics," Shi demonstrates that the ordinary citizen in Beijing eschews national politics (where power rests entirely in the hands of the Politburo anyway) in favor of political activism at the local level and the policy implementation stage.

Political participation in the PRC also differs from activism in other countries in its emphasis on individual action. Shi investigates the impact of work units, the basic module of government-created social organization in the PRC, on individual political participation. As the primary source of resource allocation in urban China, work units discourage collective political activism in two ways. First, since people focus their political participation on gaining resources for their work unit, it becomes both improbable and impractical that interest groups will form across the barrier of work units to link people of similar social strata and political interests. Second, competition for resources within work units dictates that people will lobby bureaucrats to distribute resources to them rather than to others within their social strata. Shi concludes that this system renders collaboration between people with similar interests not only unnecessary but irrational.

Two flaws hamper the effectiveness of *Political Participation in Beijing*. First, the small sample size used in the survey severely circumscribes the scope of Shi's analysis. The data he uses comes from a pilot study intended as a precursor to a larger survey that was never completed because of the Tiananmen incident. With only 757 usable responses, the survey data can hardly purport to represent other cities, rural areas, or different geographical regions in a country with over a billion residents. As the title of the book indicates, Shi is aware that his findings apply only to Beijing; nevertheless, he makes careless generalizations about China that the available data cannot support. For example, in his conclusion, Shi overstates the results of his survey in declaring: "Political involvement in Communist China by private citizens is much more intensive than has been generally believed" (p. 268).

Second, Shi's survey is the victim of poor timing. Shi acknowledges that the survey was conducted during the most liberal period in the forty-seven year history of the PRC. In the aftermath of the 1989 democracy protests, however, the Chinese government has adopted a much more vigilant and proactive stance against popular dissent in any form. This hardline reform may have substantially affected political participation in Beijing since the conclusion of this study, thereby limiting its applicability.

But these flaws, though severe, do not entirely diminish Shi's contribution to the existing research on China's sociopolitical mechanisms. Although it addresses an enormously complex topic, his writing is logically organized, cleanly written, and persuasive within its limitations. Indeed, the innovative and formidable analytical abilities that the author displays in *Political Participation in Beijing* make the reader hope that someday Shi will complete a more representative and germane study. For now, his study of pre-Tiananmen Beijing demarcates a valuable starting point for future scholarship on political participation in China.

Russia's Constitutional Revolution: Legal Consciousness and the Transition to Democracy, 1985–1996. By Robert B. Ahdieh. University Park, PA: Pennsylvania State University Press, 1997. Pp. viii, 255. Price: $30.00 (Hardcover), $14.95 (Paperback). Reviewed by Deirdre A. O'Connell.

The subject of Robert Ahdieh's book *Russia's Constitutional Revolution: Legal Consciousness and the Transition to Democracy, 1985–1996*, is the building of constitutionalism in Russia. Ahdieh describes constitutionalism both as a framework for analysis and as an approach for building political stability; constitutionalism, according to him, is not simply the institutional structure but the whole process of governing. He argues that constitutionalism is an urgent matter of public interest because it is one of the keys to developing democracy and the free market system. Specifically lacking in Russia is a well-developed legal consciousness, a failure that Ahdieh attributes to the focus on constitutional structures rather than on a supporting legal culture.

Russia's Constitutional Revolution is divided into two parts. Part I is highly descriptive, outlining the legal and constitutional developments in the former Soviet Union and in post-Soviet Russia from 1985 to 1993. In Part II, in an attempt to bring out new ways of understanding constitutionalism as it develops in Russia in the future, the author applies several guiding principles to significant issues currently facing that country. In the final section of the book, Ahdieh discusses the specific practices needed for successful constitutionalism in Russia.

Ahdieh, who worked as a research associate at the Gorbachev Foundation in Moscow and then completed *Russia's Constitutional Revolution* while a student at Yale Law School, criticizes Mikhail Gorbachev's efforts to build constitutionalism without having first adequately emphasized the development of a regularized civil society. The new constitutional structures, lacking the requisite enduring constitutional spirit, were bound to fail. In addition, Ahdieh holds Gorbachev responsible for opening a Pandora's box by vocally praising the law and the constitution while simultaneously using them as tools within the system rather than allowing them to act as arbiters of development.

Ahdieh is particularly concerned with the politicization of the Constitutional Court, which he faults for joining in the political melée instead of limiting itself to neutral adjudication of new governmental practices. Ahdieh surmises that if the Constitutional Court had become a "rallying point of constitutionalism in the political order[,] it is no exaggeration to say that it might well have changed the course of Russian history" (p. 84). Although the Court did not rise to that challenge, it did raise the consciousness of the Russian population and became viewed as a dispenser of justice in the role of protector that previously was attributed to the Russian tsar or a benevolent Communist Party boss.

Throughout *Russia's Constitutional Revolution*, Ahdieh argues that public participation and legal consciousness are crucial. Political legitimacy conferred by elite constitutionalism is necessary but not sufficient for an enduring constitutional order; only popular constitutionalism will provide for this. Respect for

the law by the intelligentsia is required because without it "[m]oney will displace the law, and even rank, as the final arbiter of power" (p. 141).

The specific practices that Ahdieh highlights as necessary for successful constitutionalism in Russia are classified into four categories: politics, the law, the economy, and external influences. In the political arena, Ahdieh argues for compromise and cooperation as well as supporting rhetoric and advocates federalism as a way of devolving decisionmaking authority to local governmental bodies. In the political category, Ahdieh cautions that the public perception that political corruption is rampant is a real threat to the future of constitutionalism.

Regarding the law, Ahdieh argues for increased roles for the Constitutional Court, the lower courts, and the Constitution of the Russian Federation. Public faith in constitutionalism will be encouraged, he claims, when individuals experience the equal protection of the law and observe that the courts, as institutions, guarantee limits on government action. The author also advocates a heightened awareness of individual rights and how to exercise them.

In earlier Russian and Soviet times, the rest of the world had little direct influence on Russia's political affairs. This situation has changed so that the external world is now actively involved in Russia's development. Ahdieh quotes Valery Zorkin, the former chairperson of the Constitutional Court of the Russian Federation, as saying that Russia needs an "intellectual Marshall Plan" that will "intimately connect to the West's legal and political norms and encourage its evolution into civilized legal culture" (p. 191). Ahdieh appropriately cautions that the nature of Western involvement should be advisory rather than directive.

Given the turbulent history of the former Soviet Union, it is interesting to entertain predictions about Russia's future. Ahdieh maintains a guardedly optimistic opinion, based on the increasing normalization of the political and economic order in Russia. Democratic processes such as meaningful democratic voting for parliament, the presidency, and political referendums have become "an essential, and *expected*, part of public life" (p. 220). The political balance itself appears to be stabilizing between pro- and anti-reform forces. Large cohesive parties are emerging, and extremism is being marginalized. The threat posed by vocal nationalists such as Zhironovsky is now viewed as exaggerated.

Demographics appear to support Ahdieh's optimistic view as well. The supporters of communism and nationalism are generally elderly and often are economically marginalized pensioners. Supporters of reform, however, are much more likely to be younger and economically better situated voters. The large number of political candidates who would continue to promote economic reform and democracy is yet another compelling factor in Ahdieh's argument. As Ahdieh notes, only several years ago the idea of Russia without Yeltsin was horrible to imagine.

The Russian economy continues to stabilize. Former communist enterprise managers have proven adept in the transition from a state-controlled system to a competitive market economy. Ahdieh cautions, however, that the positive trends toward political and economic stabilization will not be sufficient to ensure that Russia will become a democratic, free market country. He argues that it is the

development and central positioning of constitutionalism in Russian society that will have the greatest effect.

The author offers specific advice. He warns, for example, that the President must act within the constitutional authority of his office. For Yeltsin—who wrote in his memoirs that "everyone knows that we Russians do not like to obey all sorts of rules, laws, instructions and directives . . . ." (p. 199)—this is not a frivolous platitude. Ahdieh advises the Russian Government to reduce the massive state bureaucracy, especially since it tends toward conservatism and anti-reform behavior. And finally, he implores the Russian people to dispense with what he calls their "proclivity for fatalism" (p. 198).

One of the most interesting aspects of *Russia's Constitutional Revolution* is Ahdieh's methodology and research material. He interviewed numerous influential individuals in the Russian legal and political arenas: everyone, he says, from Mikhail Gorbachev to taxi drivers. These personal interviews bring vitality to the text, but the book's abundance of personal observations is also the source of its main weakness. For example, fragmented direct quotations that force the interested reader to look constantly at the footnotes are common.

Ahdieh's contribution to understanding the dramatic political changes in Russia comes from the impressive collection of voices that he has presented, taken from extensive personal interviews, and from his own observations. Ahdieh persuasively argues in *Russia's Constitutional Revolution* that the future of Russia will be determined by the legal consciousness of the Russian people and the rule of law.

International Human Rights

The Abolition of the Death Penalty in International Law, 2d ed. By William Schabas. Cambridge: Cambridge University Press, 1997. Pp. ix, 403. Price: $90.00 (Hardcover). Reviewed by Kate Hutchins.

An ardent opponent of capital punishment, William Schabas, a professor of law at the University of Québec at Montreal, offers a detailed summary of the major developments in the issue's treatment in international law in the past fifty years. Schabas analyzes not only the major international death penalty-related instruments, but also the drafting processes, *travaux preparatoires* (legal history), and jurisprudence emerging under international law.

The book chronicles one aspect of the abolitionist movement: the attempts by several abolitionist states and human rights organizations to encourage the international community to ban capital punishment in all circumstances. Although the focus on international human rights norms may be narrow in scope relative to the various influences on the development of such norms in states' domestic policies, Schabas's treatment is both informative and exhaustive.

The first human rights declaration to address capital punishment appeared in response to World War II, when the world community acknowledged the need for an international bill of rights. The Universal Declaration of Human

Rights, adopted in 1948, was the first step toward guaranteeing human rights—in both war and peace—but it was neither binding nor particularly critical of capital punishment. Schabas notes that although certain abolitionist states had wished to include more explicit treatment of the death penalty, the only relevant provision, article 3, merely guaranteed a "right to life, liberty and security of the person" (p. 311). Capital punishment, it is often argued, was an implicit exception to this right.

It was not until the drafting of the International Covenant on Civil and Political Rights (ICCPR) that capital punishment was widely discussed as a controversial exception to the "right to life" (p. 94). The drafters began work on the ICCPR in the spring of 1947 but did not complete it until 1966, when the United Nations General Assembly adopted it. Schabas addresses the drafting process of this document in great detail, arguing that the ICCPR's assertion of the right to life, delineation of the rights of those sentenced to death, and prohibition of the execution of juveniles and pregnant women were strong steps toward universal abolition. There was, however, much debate during the drafting of the ICCPR, which culminated in individual countries' taking exception to specific parts of the treaty and making "far and away the most extensive reservations to the capital punishment provisions of any human rights treaty" (p. 83).

According to Schabas, the realization of internationally recognized death penalty policy occurred with the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty, which explicitly called for abolition of the death penalty in all its forms. The strength of its 1989 declaration made the Protocol quite controversial, although the framers only wanted the agreement to be an option for abolitionist states.

The book is generally organized in chronological order, but the author discusses the Universal Declaration of Human Rights, the ICCPR, and several other agreements in international law separately. Other documents that played a role in the capital punishment debate, such as the Convention on the Rights of the Child and the Geneva Convention of 1949, receive cursory treatment. Schabas attempts to demonstrate the gradual progression of the international community toward a policy of abolition of the death penalty in all states.

The second part of the book addresses regional policies in two areas that the author asserts are most progressive toward an abolitionist point of view: the European regional system and the inter-American human rights system. These are the only two such systems that have abolished the death penalty through the adoption of multilateral conventions—respectively, the 1955 European Convention on Human Rights and the 1948 American Declaration of the Rights and Duties of Man. These conventions serve as models for what Schabas claims is an international trend toward abolition. But Schabas's failure to discuss the retentionist states and regions—particularly Islamic ones—is unfortunate, as it would be helpful to understand these states' resistance to abolition as well as progressive states' embrace of it.

This second edition of the book (the first was published in 1993) adds examinations of recent developments in the various instruments of international human rights law and their interpretation in the international sphere, as well as discussion of two regions Schabas contends are particularly advanced in their progress toward abolition. Although brief, his commentary on the treatment of capital punishment in the ad hoc tribunals for Rwanda and the former Yugoslavia, the proposal for a permanent International Criminal Court, and steps recently taken by individual countries are a welcome addition to the book.

After the first edition was published four years ago, criticism of Schabas's optimism about global abolishment of the death penalty was widespread. In this new edition, Schabas responds by pointing out that his prediction that "prior to the year 2000 a majority of the world's states will have abolished the death penalty" (p. 296) has come true: In 1995, six countries abolished the death penalty, making abolitionist states a majority.

This does not, however, dispel criticism that Schabas is overly optimistic. He admits that the United States and Islamic states will be slow to reject the death penalty but concludes that universal abolition is an end that has been "brought . . . into sight" (p. 396). Schabas fails, however, to address the means by which the resistance of the remaining retentionist states might be overcome, the obstacles insurmountable through international treaties and conventions, and the next steps that might be taken at the international level. Despite these shortcomings, the book continues to be a highly informative and detailed work, not only in its explication of the development of capital punishment norms and policies, but also in the drafting and interpretation of major international human rights instruments in general.

Laws of Foreign Countries

EC Law of State Aid. By Andrew Evans. Oxford: Oxford University Press, 1997. Pp. xlviii, 484. Price: $125.00 (Hardcover). Reviewed by Jean Albert.

The legal basis for the control of state aid under European Community (EC) law is contained in articles 92 to 94 of the EC Treaty, which set out the principle of the prohibition of state aid and establish the European Commission as the key institution of control. The intervention of a multitude of other actors and conflicting Treaty priorities complicates this structure.

EC Law of State Aid provides an exhaustive and critical examination of state aid control practice under European law. The book addresses a genuine need for information on the part of practitioners and academics. Although the title is clear, the author's refusal to call the book *European Union* Law of State Aid is telling. For Evans, state aid control needs to be reformed in order to reflect the aspirations of the Union. The reform should not only be based on cost-benefit analysis but also focused on integration at various levels, such as policy determination, lawmaking, and implementation.

The work covers areas related to the control of state aid, including the concept of aid, prohibitions, exemptions, and procedures, and blends a diachronic and synchronic analysis, resulting in a technically complex but comprehensive picture of the issue as a whole. Through a thorough analysis of the Commission's decisions and their decisionmaking process, Evans shows the opacity of the control of state aid. In particular, he addresses transparency and integration issues in the decisionmaking process. The applicability and implementation of the Treaty provisions depend on a chosen policy. As long as the policy prioritizes competition, the decisions of the Commission comport with articles 92 to 94 of the Treaty. If the Commission follows other policies, namely those that respond to other priorities (for example, environment or agriculture) set forth in the Treaty, the legitimacy of the decisions become questionable.

After an introductory chapter, the author identifies, in his second chapter, the various forms of aid to which the prohibition of article 92(1) applies. The Commission operates *a priori* and *a posteriori* to implement its control. The general prohibition of state aid prescribed in article 92 is part of chapter 1 of Title V of the Treaty, which establishes rules on competition. Concerning state aid, the emphasis is placed on anti-competitive effects—a presentation that implies that state aids are *per se* anti-competitive. Because competition is seen as the best way to achieve integration, states are forbidden to endanger the competitive market structure, which, according to Evans, is required to achieve the goal of integration. Article 92 is one of the Treaty provisions that enable the Commission to enforce this objective when state action reconstructs national barriers. Even if market integration is not *per se* an indication of efficiency, competition as a means to guarantee integration serves efficiency goals. Other means, however, may better serve the objective of integration. The author contends that these means sacrifice efficiency and that the choice to give them priority should be the fruit of an integrative decisionmaking process. The existence of such a process is highlighted in the decisions of the Commission concerning exceptions to the prohibition of article 92(1).

Through references to articles on the subject and an examination of the decisions of the Commission, Evans shows that the Commission has broad discretionary powers to authorize these exemptions. The presumption of incompatibility of state aid with the common market creates these powers. The author retains one major general principle for exemption, which he presents in the third chapter as "compensatory justification." This principle encapsulates other principles such as community interest, proportionality, non-durability, development, and transparency. "Compensatory justification" derives from the rule that *necessitas publica major est quam privata*, which is the foundation of the European Community. Regional, sectoral, and horizontal areas of state aid receive a modulated treatment of the above principles. This explains the author's choice to refer to the trinomial in the following chapters. The modulation means that a number of parameters, aside from competitiveness, form the decisional field of the Commission's state aid control. These aids, which affect trading conditions, are acceptable providing that priority is given to the common

interest. Regional development aid takes precedence over competition when it better serves integration purposes. Two requirements follow from this emphasis on development: Such aid should concentrate on needy regions, and it must create a real development incentive. Sectoral aid aims at the development of specific economic activities. The development principle is modulated between the different sectors. Horizontal aid, a more heterogeneous and welcomed category, leads to modulation of the proportionality principle.

The author then explains how the contents of the criteria determining the compatibility of state aid with the Treaty are left to the discretion of the Commission, which believes that regional, sectoral, and horizontal aid may be judicious means of contributing to more thorough integration if they are adequately distributed. Evans consequently contends that the decisionmaking process and the articulation of article 92 do not amount to a unidirectional relationship going from principle to exception and focusing on competition. Applying the rule of reason to aid that distorts competition may lead to the prohibition of such aid, but it also reveals that competition is but a tool for an integration policy. Regional, sectoral, and horizontal aid control analysis unveils other requirements and a more complex framework of interactions.

In the last chapter, the author examines the procedures related to the control of state aid. By the term "procedures," the author means general legislative procedures as well as remedial prescriptions and enforcement. He describes the formation of state aid policy in the European Union. Cooperation agreements, integrative legislation, administrative decisionmaking, and jurisprudence are thoroughly scrutinized. Evans stresses the practical absence of hierarchy in state aid control procedures. Interactions reflect interdependencies in that both entail a mixture of horizontal and vertical relationships. The author refers to certain types of legislation as "soft law." In fact, one should refer to these as "law" whether or not they are the result of implicit powers of the Commission. Furthermore, even though Evans does describe most issues concerning state aid control, he neglects, in some cases, to take a position and formulate viable answers to crucial questions. For example, should trade associations be entitled to bring proceedings? How are the "problems" solved when various recipients challenge a decision made under article 93(2)? How is recovery made effective? Concerning these and similar issues, the book could be less descriptive and more prescriptive.

It also would have been of interest for the author to deepen his analysis on a new area of exemption provided for by the Treaty—the official recognition of the acceptability of state aid directed at promoting culture and heritage conservation, an exemption that indicates new trends in state aid policy. Finally, since the book was published, evolutions in specific areas of state aid control have occurred. These areas include transportation; the steel industry; agricultural and fisheries products; restructuring of firms in difficulty; and export-credit insurance.

Ebu's-su'ud: The Islamic Legal Tradition. By Colin Imber. Stanford, CA: Stanford University Press, 1997. Pp. xii, 288. Price: $49.50 (Hardcover). Reviewed by Michael Durham.

This book continues—and substantially broadens—the series *Jurists: Profiles in Legal Theory*. Whereas other books in the series have concentrated on modern Western thinkers like Francis Bacon, Ronald Dworkin, and Max Weber, this text focuses on Ebu's-su'ud, the medieval Islamic jurist credited with reconciling Ottoman secular law (*qanun*) with the Islamic sacred law (*shari'a*). The author, who is senior lecturer in Turkish at the University of Manchester, covers his subject well by documenting how and to what extent Ebu's-su'ud achieved the reconciliation of *qanun* and *shari'a*. At one level, he simply shows the contributions that Ebu's-su'ud made to the Ottoman law of his time. But in doing so, he also offers the reader a glimpse of the larger Islamic legal tradition that formed the backdrop for those contributions.

Imber begins by giving a brief sketch of Ebu's-su'ud's life and the societal structure of his time. Ebu's-su'ud was born in about 1490 to a learned (and reputably holy) man close to the Sultan. His father's position allowed him to rise rapidly through the ranks of legal scholarship and eventually into the highest judicial positions of the empire. In the Ottoman system, jurisconsults called *muftis* wrote answers to legal questions which, while not binding until a judge or other official executed them, were nevertheless authoritative for future cases. The sultan usually chose one of the highest judges to be the most important *mufti*, the *sheikhu'l-islam*. Ebu's-su'ud came to this office in 1545, and it was there that he made most of his lasting contributions to Islamic jurisprudence.

The context for those contributions, Imber argues, was a tension between two quite different legal systems: the theoretically supreme religious law (the *shari'a*) and the feudal rules actually laid down and enforced by the Ottoman Sultan (the *qanun*). The former was grounded in the Quran and in other records of Mohammed and his Companions, but it also consisted of the extensive interpretations and elaborations of these divine sources by great jurists of the intervening centuries, including those of the Hanafi school whose jurisprudence dominated the Ottoman Empire. The Hanafi jurists developed from the more skeletal legal framework given by canonical sources a systematic treatment of all sorts of details not immediately addressed by those sources. The resulting body of sacred law, the *shari'a*, was, however, in many areas more a scholarly attempt to systematize the law than a practical attempt to solve the day-to-day problems of governance; many of the questions addressed by the Hanafi jurists came up rarely, if ever, in practice. The *qanun*, on the other hand, was a collection of feudal practices and Sultanic decrees by which much of the actual work of governing society was done; as such, it was a difficult political reality to fit into the ideal mold of the Hanafi *shari'a*, which claimed divine authority and left the ruler very little legislative authority.

In Part II of the book, Imber argues that Ebu's-su'ud's *fatwas* (responsa issued by a qualified jurist) aimed in large part to make room for the Sultan's

authority in the *shari'a*. This Ebu's-su'ud did first by translating existing Sultanic decrees or customs into Hanafi terms so that they appeared to be in harmony with sacred law or by asking the Sultan to issue decrees at least nominally satisfying the Holy Law's requirements—all with only minimal effect on actual practice.

Second, Imber argues that Ebu's-su'ud supported the Sultanate's authority by claiming that the Sultan had inherited the Caliphate. Imber argues that by making the Sultan Caliph, Ebu's-su'ud gave him the right to make decrees defining the *shari'a* in cases where the Hanafi jurists were silent or disagreed. Ebu's-su'ud thus legitimated the Sultanate both by making its practices appear to conform with the Holy Law and by increasing its ability to say what that law was.

After laying out the general shape of Ebu's-su'ud's attempt to harmonize secular and religious law, Imber devotes the rest of the book to describing in detail how that harmonization worked out in the areas of land tenure and taxation, trusts, marriage, and crimes and torts. He devotes a chapter to each area, discussing in order Hanafi doctrine on the subject, any relevant laws in the Ottoman *qanun*, and Ebu's-su'ud's position. Imber extracts that position by analyzing *fatwa* after *fatwa* in light of the *shari'a* and the *qanun*, usually arguing that Ebu's-su'ud's modifications to the *shari'a* served to protect the Sultan's power. Imber finds the reconciliation most complete in the area of land use and taxes, where Ebu's-su'ud managed to construe current feudal practices and taxation in such a way as to fit relatively neatly into the Hanafi mold. In other areas, Ebu's-su'ud followed the Hanafi jurists less strictly, sometimes making key modifications in order to fit the times. For instance, he allowed cash trusts, which others had forbidden as usury, and added criminal intent as a consideration in punishing those who harmed other persons or property. In every area, he gave the government a larger role in overseeing and applying the law, even in traditionally private areas like that of marriage.

In these last chapters, Imber demonstrates a comprehensive and intricate knowledge of Ebu's-su'ud's jurisprudence as well as of the Hanafi tradition out of which it grows. Imber's analysis of the effect of the *fatwas* of Ebu's-su'ud, though occasionally far-fetched (as when he treats Ebu's-su'ud's insistence that females be subject to male guardians as a symbolic endorsement of the Sultan's power in the empire rather than simple sexism), is generally plausible. Imber sometimes writes, however, as if Ebu's-su'ud used the *shari'a* only as a tool to lend legitimacy and power to the Sultanate. He acknowledges that Ebu's-su'ud's attempt at reconciliation also stemmed from true religious devotion, but he so deemphasizes this in favor of more modern and secular political aims that it must come as a surprise to the reader that Ebu's-su'ud is still known today as one of the greatest Quranic exegetes. Despite this modern slant, however, the book gives a detailed picture of Ebu's-su'ud's contributions to the law that is valuable even to an expert in the field and thereby introduces the novice to the general problems, methods, and structure of the Islamic legal tradition.

International Legal Theory

Recognition of Governments: Legal Doctrine and State Practice, 1815–1995. By M.J. Peterson. New York: St. Martin's Press, 1997. Pp. ix, 295. Price: $59.95 (Hardcover). Reviewed by Steven A. Engel.

While foreign governments may not always get along, most of the time they at least know to whom they are talking. But when an established government falls through extralegal means—be it by coup d'etat, popular uprising, or rebel insurgency—foreign leaders must decide whether they will accept the new leadership as the legal representatives of the state. M.J. Peterson, an associate professor of political science at the University of Massachusetts, Amherst, devotes this book to articulating the principles behind the recognition of governments through an exhaustive and, at times, exhausting survey of the doctrine's development over the past two centuries.

Although governments may fall, international law presumes that states are eternal. Recognition decisions matter because they entitle the new government to the treaty privileges and foreign property owned by the previous regime, entitling the newcomers to assume their predecessors' role in international organizations as well as requiring them to shoulder existing diplomatic obligations. But while recognition, in its traditional form of expression, seems rather straightforward, Peterson's study shows that like so much international law, the doctrine is beset by tensions and inconsistencies.

On its face, the legal doctrine of the recognition of governments pits each state's autonomy in settling its own domestic affairs against the discretion that other governments enjoy in determining the extent of their relations with foreign powers. The strictures of international law suggest that each state has an obligation to recognize any government that has effective control over the territory of the state. Yet, as Peterson describes, states often have used their discretion to condition recognition and the benefits that accompany it for their own political ends.

Whether they are twentieth-century democracies withholding recognition of the Soviet Union or earlier European monarchies denying the legitimacy of the French Revolution, states may use recognition to express their approval or disapproval of the form of the new government. They might also express their condemnation of the extralegal means by which the new government seized power, ostracizing the military junta in 1990s Haiti, for instance. States might also seek to extract concessions in return for recognition. The quid pro quo may be as high-minded as demanding constitutional guarantees of human rights or as crude as demanding payoffs in the form of favorable trade standing.

Peterson's account is straightforward and readable, although it bogs down a bit in its historical categorizations. The author somewhat mechanically divides the past two centuries into eight distinct periods and then tends to list how different aspects of recognition were received in each period. Another limitation of the study lies in its consideration of the present state of the doctrine. The book itself stems from the author's doctoral dissertation, written twenty years ago.

While she has made an effort to update her study, Peterson's discussions of the future rely less on recent problems than on extrapolations of the trends of the 1970s. In particular, the author fails to deal with recognition as a response to the breakup of the former Yugoslavia.

Peterson's historical survey succeeds in showing how states have used recognition in different ways at different times, depending upon ideology, great power politics, and their level of interdependence. This last point becomes the key to Peterson's analysis of modern state practice. She convincingly shows how the increase in state ties has made it ever more difficult plausibly to wield recognition as a political weapon. This conclusion seems strange when one considers how the Cold War powers used recognition to punish unfriendly regimes, the most notable example of this phenomenon being the long isolation of the People's Republic of China. Moreover, over the past twenty years, there has been a steady movement within the liberal democracies to condition recognition on the protection of human rights, ethnic minorities, and democratic norms.

Rhetoric aside, Peterson shows how such lofty goals inevitably have fallen short amidst the economic, social, and political ties of the late twentieth century. States that routinely have used recognition as a political weapon, in particular the United States, more often than not have done so only by compromising the meaning of the term. Although states may deny official contacts with the new regime, that has not stopped them from sending representatives on a slew of "non-political" missions, permitting national courts to enforce the property claims of the new government, and accepting its participation in a host of multilateral organizations. These actions of tacit recognition have eroded the significance of the recognition doctrine and, indeed, have led many western governments publicly to advocate the demise of recognition as an international institution.

That said, Peterson understands that despite politicians' claims about the death of recognition, it is likely that states still will use it whenever they can derive advantage from it. Peterson finds the most common suggestions for change to be unworkable, primarily because governments are unwilling to give up their discretion in the matter. One popular idea, relying upon international organizations to set common standards of recognition, may work on occasion but often will fail to establish the necessary consensus. Moreover, the idea of doing away with recognition altogether seems unlikely as democratic publics insist in ever greater numbers upon the universal and perhaps exclusive legitimacy of their form of government. Whatever ideas lawyers may bandy about, states seem to be stuck with recognition whether they like it or not.

International Law Studies: Collected Papers Volume 2. Anthony D'Amato. The Hague: Kluwer Law International 1997. Pp. x, 394. Price: $94.00 (Hardcover). Reviewed by Ralph Wilde.

This publication is the second volume in what is planned to be a series on the writings of Anthony D'Amato, Leighton Professor of Law at Northwestern University. The volumes contain previously published pieces by the author, dating back as far as 1967. The first volume, published in 1995, examined minority rights and the use of armed force both generically and with respect to specific situations, and D'Amato promises future volumes on international law litigation and "pure theory." In this volume, D'Amato describes himself as focusing on international law in three ways. First, he "applies it to external subject matter" in chapters on the global environment, human rights, and foreign relations. Secondly, he combines it with the "other discipline" of political science in chapters on Machiavelli, psychological approaches, and political theory. Thirdly, he "turns international law inward" in chapters reflecting on the role of academics and practitioners in the discipline.

The volume offers an insight into D'Amato's thoughts on a wide range of international legal topics. Each contribution presupposes a background in the area, as D'Amato's purpose is to apply his particular approach to a familiar topic rather than to explain fully what he considers to be the orthodoxy that he challenges. D'Amato does not necessarily apply himself to the entirety of any given topic, but instead hones in on particular issues that he invariably sees as problematic. A feature of the archival nature of the publication is that some of the observations do not contribute much outside their particular context, bound up as they are in particular issues that have lost their significance since D'Amato first wrote. Thus the publication is as much a historical record as it is an examination of contemporary international legal issues.

The chapter on human rights and foreign policy, written in 1988, is illustrative of the approach of the volume in general. Focusing exclusively on U.S. foreign policy, D'Amato first argues that human rights are likely to play a significant role in foreign policy in the future and then identifies issues that he feels will dominate human rights discourse: "associational exclusivity" (nationalism); the right to subsistence; the right of children to family support and nurture; and civil and political rights. D'Amato declares that the human rights "revolution" is "perhaps the most important development in the cultural history of homo sapiens" (p. 127). Initially, the human rights discussed appear to be concerned exclusively with free markets and property, and thus he asserts that "[u]nder President Reagan, with inconsistencies here and there, human rights increasingly occupied center stage in our dealings with other countries" (p. 129). He then devotes a paragraph to the debate on the complex issue of self-determination. D'Amato rapidly concludes that he is prepared to look only at the claims of those individuals within the group whose rights are being abused, rather than the claim of the group as a whole, because "we can have more sympathy" in the

former case (p. 131). The chapter offers particular insights on aspects of general topics, which the interested reader can fit into the broader scholastic framework.

Great emphasis is placed both in the foreword by Frederic Kirgis of Washington and Lee University School of Law (who implores the reader to "beware") and throughout the writing itself on D'Amato's unorthodox, idiosyncratic approach as the "self-appointed *agent provocateur*" of international legal scholarship. Readers will not be disappointed with the volume in this regard. Much of the text, as the following passage illustrates, reads like a polemic: "Private property has won over collective property, a lesson Stalin refused to learn when he butchered ten million Russian farmers who did not quite fit into his notion of agrarian reform" (p. 128). D'Amato's style is self-consciously provocative, attacking concepts and policies in a colorful and uncompromising fashion in an attempt to bring clarity and sense to the discipline. Necessarily, it is an approach that will not be to the taste of all readers, some of whom might find his observations somewhat trite (such as reminding the reader that the human race has lived for a short period of time compared with the dinosaurs); his arguments weakly supported (undocumented statements such as "customary international law is moving in this direction" abound); and his scholarship marked by an unhelpful tendency to generalization. On the other hand, it can be seen to serve as the antithesis to the measured, deferential, and descriptive approaches adopted by other writers in this discipline.

Territorial Acquisition, Disputes and International Law. By Surya P. Sharma. The Hague: Martinus Nijhoff Publishers, 1997. Pp. v, 353. Price: $129.00 (Hardcover). Reviewed by Natalie S. Klein.

Territorial Acquisition, Disputes and International Law provides an extremely thorough review of the modalities of territorial acquisition and how these modes have developed and been applied. The author, Surya P. Sharma, examines recent developments in territorial claims concerning the right of self-determination and the role of *uti possidetis*. Sharma analyzes how these modes have been used and proposes a theory to overcome the unpredictability and inadequacies that typically have characterized the resolution of territorial disputes.

Chapter One situates the contemporary importance of territorial acquisition in international law. Sharma examines the evolution of the notions of territory and territorial sovereignty from the state-centric focus of the Peace of Westphalia to the post-World War II international legal order. The operation of self-determination, human rights, and international cooperation suggest that current trends in the international legal order are moving away from an emphasis on state sovereignty. Nonetheless, Sharma rightly notes that territoriality principles are unlikely to be uprooted because of the continuing emphasis in international documents on the territorial integrity of states.

Consequently, Sharma asserts, issues concerning title to territory continue to dominate international law.

Having outlined the relevance of territorial disputes in international law theory, Sharma thoroughly examines the traditional modalities of acquisition of territorial sovereignty. Chapter Two discusses discovery, symbolic activities, contiguity, occupation, prescription, accretion, conquest, and cession. This chapter is essentially empirical rather than critical. For each process of acquisition, Sharma methodically sets out the views of eminent jurists and the treatment of these modalities in judicial and arbitral decisions. The development and application of occupation and how it compares to prescription receives great attention. In the context of traditional modalities of territorial acquisition, Sharma considers the meaning and impact of *uti possidetis* (without reference to the principle of self-determination at this stage) as well as the role of equity.

Chapter Three then presents various critiques of the modalities. By again examining the writings of many publicists, Sharma identifies various omissions and conceptual anomalies in the traditional modes. As an alternative, Sharma submits in Chapter Four that the New Haven "process" theory should be applied to meet the new requirements and aspirations of the international system. In adopting the "process" theory, Sharma proposes that territorial acquisition should encompass a package of community interaction, claims to authority, clarification of community policies, and responses of authorized decisionmakers to territorial claims. Sharma argues that the "overriding community policy is to establish and maintain a territorial order which yields a reasonable stability of title through effective control adequate to protect in each territorial unit internationally agreed rights and which at the same time pays reasonable regard to the policy of change reflected in the doctrine of self-determination." In adopting the "process" theory, Sharma essentially reformulates the traditional modalities and thereby changes the typical emphasis and perspective. As such, the application of the "process" theory does not fundamentally alter the content of the criteria that are normally applied in territorial disputes.

One of the highlights of the book is Sharma's discussion of the principle of self-determination. Sharma examines self-determination in its many forms—freedom from colonial domination, the right of secession, dissolution of states and formation of new ones, rights of minorities without sovereignty connotations, rights of indigenous peoples with territorial implications, and the right to democratic governance. This analysis considers the scope of the principle of self-determination and how it relates to territorial acquisition. While there is much disagreement between international actors and various commentators as to the acceptability of various claims to self-determination, Sharma draws the conclusion that "each form of self-determination ultimately depends upon the degree of representative extent of the government of a state. If the government is representing all peoples belonging to the territory without any distinction, the only claims of self-determination that have a chance to succeed are those which are least disruptive of public order, or which have minimal

destabilizing effects" (p. 248). On this basis, self-determination outside of the colonial setting may not be permissible, but group rights are more likely to be recognized. It is when these rights are not accepted and the group has a convincing historical claim to territory that territorial secession may be legitimate. This argument encapsulates many dimensions of the principle of self-determination and posits a theory that fairly represents the position of many current claims to self-determination. It leaves open, however, the question as to whether the theory accords with practical realities. A distinct ethnic group may well be underrepresented in the government of a country and thus have a legitimate claim to secede, for example, but these factors do not necessarily mean that the right of self-determination actually will be exercised or supported by the international system.

The remainder of Chapter Four is dedicated to a detailed analysis of a large number of current territorial disputes. The opposing claims are set out in a well-documented, objective fashion. Sharma does not purport to provide a final assessment or prediction of the likely outcome and indeed expressly excludes this task from the scope of the book in the preface. Yet this decision detracts from the cohesiveness of Sharma's argument. Prior to commencing the analysis of the major contemporary territorial disputes, Sharma argues that the New Haven "process" theory should be applied in territorial dispute decisions and also describes the advantages of and tasks involved in such an approach. Having made this argument, Sharma then proceeds to examine the contemporary territorial disputes in the framework of the traditional modalities, albeit with the addition of self-determination. The application of the "process" theory is not evident in this approach.

Chapter Five provides a general appraisal and concise summary of Sharma's arguments of territorial acquisition and disputes over territorial acquisition. Overall, Sharma has highlighted the inadequacies of the traditional modalities and approaches to territorial disputes and has also carefully examined the developments in territorial acquisition. These features are clearly brought out in the discussion of territorial disputes and illustrate the need for a consistent approach in the settlement of disputes. It may be to the relief or to the disappointment of the reader that the "process" theory is not rigorously applied in the discussion of current territorial disputes. Certainly, the importance of adopting a broad perspective through the consideration of a variety of legal and non-legal factors should not be underestimated. This point can be appreciated when reading Sharma's detailed examinations of contemporary territorial claims. Perhaps the "process" theory advocated by Sharma will provide the necessary guidance for the satisfactory resolution of these territorial disputes.

War and Peace

Peacemaking in International Conflict: Methods & Techniques. Edited by I. William Zartman and J. Lewis Rasmussen. Washington, D.C.: United States Institute of Peace Press, 1997. Pp. ix, 412. Price: $19.95 (Paperback), $35.00 (Hardcover). Reviewed by Ralph Wilde.

This ambitious publication aims to equip the lay reader with a multidisciplinary introduction to the various methods and techniques that can be deployed to study and practice peacemaking in international conflict. Peacemaking is addressed from three main standpoints: first, a theoretical standpoint, with chapters on international relations theory and social psychology; second, a technical standpoint, with chapters on negotiation, mediation, adjudication, and training; and third, a practitioner standpoint, with chapters on religious organizations, diplomacy, and non-governmental organizations (NGOs). The editors have brought together an impressive group of contributors, prominent in their respective fields. Each offers an exposition of the various facets and latest developments of a particular approach, together with useful bibliographies. While contributors of such caliber offer valuable insights, their involvement in the development of their fields may, however, have limited the objectivity of their appraisals.

In their introductory chapters, Zartman and Rasmussen place peacemaking in its historical and theoretical context. They set out the challenges of peacemaking at the end of the twentieth century, without attempting yet to address them. William Zartman, a professor at Johns Hopkins University, outlines the issues of concern to those involved in the "business of conflict resolution" as a clarion call to which subsequent contributors respond. J. Lewis Rasmussen, of the United States Institute of Peace, helpfully reviews international political theory, including a basic critique of realism, and connects the theory to peacemaking, particularly in examining how the nature of contemporary conflict gives rise to new challenges for peacemakers. Louis Kriesberg, a professor at Syracuse University, describes the history of conflict studies, a discipline that examines how conflicts arise and are resolved.

Part II is entitled "Approaches to Peacemaking." Daniel Druckman, a professor at George Mason University, highlights the four dominant perspectives on negotiation (puzzle solving, bargaining games, organizational management, and diplomatic politics), and examines the "rhythms and patterns" of each (stages and turning points, constraints and boundary roles, preparation, framing, bargaining, and concessions). Professor Jacob Bercovitch of the University of Canterbury in New Zealand provides a detailed analysis of mediation, including particular techniques, unique features, typical problems, and its contribution to conflict resolution. Bercovitch illustrates how the different roles of those engaged as mediators affect the style of mediation undertaken and suggests that the significance of old techniques like power and deterrence has diminished.

Professor Richard Bilder of the University of Wisconsin-Madison, describes the general nature and role of international adjudication, covering advantages and disadvantages compared to other techniques, future prospects, and proposals for encouragement. What amounts to a basic outline of public international law in this field largely succeeds in explaining complex conceptual issues without oversimplification. For the international legal scholar, therefore, it covers familiar ground. Occasionally, descriptions become so general as to risk misleading the reader: For example, Bilder refers to the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) without giving the necessary background in a chapter about the judicial arbitration of interstate disputes. In general, the essay succeeds in exploring a familiar topic solely in terms of its relevance to conflict resolution. In light of the subnational, interethnic and civil conflict described at the start of the book, however, a discussion of the limitations of conventional international arbitration, given that *locus standi* is restricted to states, also would have been useful.

Cynthia Sampson of the Eastern Mennonite University draws on the religious approach to peacemaking described in her book *Religion, the Missing Dimension of Statecraft* to describe the impact of particular religious actors. Sampson explores different roles (advocates, intermediaries, observers, and educators); the activities of certain actors; the particular situation in South Africa; and emerging trends and future directions. She also examines how religious actors can take innovative positions, such as being aligned to a particular side in a conflict but nevertheless serving as third party mediators because of their position of trust. Some readers may be skeptical about the objectivity of a contribution by someone so directly involved with one of the actors (the Christian Scientists) and some of the initiatives she describes. Certainly it is unfortunate that Jewish and Islamic organizations are absent, and that the detrimental effect of religion-based activities is not examined.

Part III concerns practitioners' views. Cameron R. Hulme, a U.S. diplomat, sets out the "experimental approaches" of the post-Cold War diplomatic scene: states acting in concert; U.N.-sanctioned enforcement measures; assistance to civilian authorities; and an enhanced role for the U.N. Secretary General. Each is examined through four activities: U.N. Security Council meetings; the use of impartial third parties in Africa; regional arrangements in Central Asia and the Caucasus; and sanctions and the use of force in the former Yugoslavia. Andrew S. Natsios, Vice-President of World Vision U.S., examines the impact of the NGO phenomenon. He traces NGO involvement, assesses their strengths and weaknesses as mediators, examines their approaches, and questions their ability to be impartial. The challenges faced by those NGOs with conflicting mandates are highlighted, such as needing to cooperate with regimes that include war criminals despite having policies against war crimes. Finally, in Part IV, Eileen F. Babbit of the Fletcher School at Tufts University examines how training operates with those involved in conflict. She sets out the assumptions inherent in training; the educational and political contributions that it can make; and the ethical concerns that it raises.

The chapter is a valuable overview of the current training issues and opportunities for those wishing to become involved.

The style of the book reflects the multidisciplinary nature of international relations, as peacemaking is seen to draw on the skills of mediators, negotiators, lawyers, diplomats, NGO workers, and the military, with all actors needing to understand how their fields are connected to those of others. Particularly effective chapters, such as mediation, explore this interrelationship, offering fresh insights to the other approaches discussed. Readers with a greater knowledge or interest in a particular approach will not be satisfied with the overview provided but will see how their approach fits into the wider framework that operates in a complex phenomenon such as international conflict. The book is a welcome addition to the corpus of international relations scholarship that has brought together hitherto unconnected disciplines under the umbrella of a particular international phenomenon. In doing so, it illustrates how well placed the discipline of international relations is to facilitate this synthesis.

The Spoils of War. Edited by Elizabeth Simpson. New York: Harry N. Abrams, Inc., Publishers, 1997. Pp. 336. Price: $49.50 (Hardcover). Reviewed by Zoe Hilden.

The Spoils of War collects papers from the Bard Graduate Center's 1995 symposium on "World War II and Its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property." The Bard Symposium essays frame the debate over "displaced" cultural property through the lens of twentieth-century history, documenting the losses occasioned by the Nazi and Soviet regimes' official policies of theft and destruction of cultural artifacts, and addressing the legal merits of claims to restitution in this context. Several authors have contributed historical accounts of the property losses of various countries as a result of the war. Other essays detail, for example, Hitler's project for a museum of expropriated art, designed to subject the cultural production of diverse peoples to the glorification of the ideology of Aryan supremacy, and the postwar efforts of an American commission to catalogue and restore works stolen by the Nazis. Most of the contributors to the symposium argue for the return of all cultural property to prewar ownership, and the moral and legal rightness of this position is overwhelmingly seen as self-evident. The theoretical foundation for this volume therefore remains rather insubstantial, despite a few essays describing the relevant law. An appendix of treaties, conventions, and other documents chronicles the attempts of international organizations to establish a universal code of "humanitarian" treatment for cultural property. The analogy to the laws of war for the protection of civilian populations resonates throughout this volume: The fate of displaced art works is likened to that of "prisoners of war" (p. 98), and Vattel is cited for the proposition that willful destruction of cultural property is the act of "an enemy to mankind" (p. 101).

In 1995, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the International Institute for the Unification of Private Law (UNIDROIT) adopted a draft convention for the return of cultural property. In her introduction to *The Spoils of War*, the book's editor, Elizabeth Simpson, reprints an excerpt from a statement of American art dealers, museums and auction houses expressing opposition to the draft convention on the grounds that it "would inhibit the ability of U.S. museums to acquire and/or exhibit a vast array of objects, and would paralyze the public market for anything which could fall within the law's overly broad definition of cultural property" (p. 15). For Simpson, this statement is evidence that "[t]he interests of the international art market [are] in certain instances . . . contrary to the interests of the world community at large" (p. 15), perhaps even to the world community's moral obligations. Here, however, is where the distinction between human and material losses, occasionally lost in the Bard Symposium essays, must be stressed. In the case of displaced cultural artifacts, the interests of the world community may be conflicted; the fate of the Franz Koenigs collection of Old Master drawings, for example, in contrast to that of the human victims of the war, is unavoidably a complex moral question. Whether in every instance international law should restore the status quo ante—itself determined by the market—by returning works that may now be in public museums to private ownership is debatable. Thus, this collection of essays ultimately betrays a deep ambivalence about the conflict its editor poses in the introduction, with one contributor advocating a return to cultural circulation for the "benefit of humankind" (p. 71) and another arguing that "a nation should be able to reclaim all cultural property that has been lawlessly expropriated" (p. 50).

The Spoils of War may bring us only a few tentative steps closer to resolving the complexities of the debate surrounding the legal status of cultural property—complexities that only deepen outside the context of World War II. (Consider, for example, demands of former colonies for the restitution of expropriated artifacts; depending on the definition of "cultural property" and on what law applies to determine whether export was illegal, the volume of artifacts of questionable ownership is potentially vast.) The real contribution of this collection of essays is in its eloquent illustration of just how much is at stake in the debate. The relationship between the human losses of the war and the loss of property may be uneasy, but these essays suggest that it is also quite real: "Behind the enumerations of paintings, archives, and religious objects move the specters of lost families, lives, and cities" (p. 47). Thus the objects may come to symbolize that which cannot be restored; paradoxically, it is perhaps for this reason that some such artifacts should remain abroad, to represent in the eyes of the world the reality of those losses and the precariousness of culture itself.

International Trade

Comparative Disadvantages? Social Regulations and the Global Economy. Edited by Pietro S. Nivola. Washington D.C.: Brookings Institution Press, 1997. Pp. x, 368. Price: $49.95 (Hardcover), $19.95 (Paperback). Reviewed by George Busu.

Comparative Disadvantages? consists of six essays prepared by scholars who attended a conference at the Brookings Institution in 1996. Five of the essays are followed by commentary by participants at the conference. The primary aim of the conference was to initiate an intellectual exploration by a larger community of experts and perhaps to inspire wider inquiry into the emerging tensions between America's sometimes unusual regulatory style and the growing pressures of globalism.

In Chapters One and Two, Pietro Nivola presents the questions that the other authors attempt to address in greater detail through the analysis of specific regulatory measures. Nivola's main point is that in a rapidly changing and increasingly competitive economic world in which domestic regulatory decisions often have profound international effects, the United States places its industry at a distinct disadvantage by running a costly and inefficient regulatory process and relying excessively on litigation. Nivola challenges the widely held belief that strict U.S. regulatory measures do not threaten its international competitiveness because conditions in other countries are far worse. Although the economies of competitors such as Germany and Japan are taxed more and subject to more rules than that of the United States, expensive social and bureaucratic programs in such countries have the distinct benefit of leading to less litigation. Americans' preference for less government intervention and less direct taxation has helped create a system with more litigation. The question then becomes whether either of these two approaches is more efficient overall and therefore provides a competitive advantage. Nivola seems convinced that America's overly litigious system of enforcement is a liability and in desperate need of reform. It harms exports, as companies often find it profitable to move operations overseas to limit their exposure to lawsuits, and discourages foreign investment, as foreign companies are deterred by their unfamiliarity with complex American laws.

All of the following essays argue that in several important areas, U.S. regulation has imposed unnecessary costs. In Chapter Three, David Vogel raises the issue of whether the gradual disappearance of traditional barriers to international trade, such as tariffs, has led the United States to substitute other domestic policy tools to limit imports and protect its native industries. Vogel cites the Corporate Average Fuel Economy standards for automobiles and the 1990 Clean Air Act as examples of environmental regulations that have reduced imports by making it tougher for foreign firms to compete. He attributes such regulatory effects to powerful interest groups wielding undue influence in the political process and, as a solution, proposes the adoption of the "least trade restrictive" rule when setting environmental standards. Chapter Five, by Marc

Landy and Loren Cass, explores the economic drain on American industry caused by inefficient environmental programs. Although the cost of such programs appears small when compared to overall gross domestic product (GDP), Landy and Cass argue that increasing global competition has greatly reduced the margin of error, and thus, the United States must amend statutes that prevent regulators from implementing cost-effective alternatives.

In Chapter Four, Robert A. Kagan and Lee Axelrad address the problems caused by U.S. reliance on adversarial legalism to resolve many of its regulatory difficulties. Kagan and Axelrad assert that the American regulatory system's method of enforcement is unique, leading to consistent and costly legal battles over the most minute arguments. They conclude that the U.S. system places America at a competitive disadvantage, as it is costlier in comparison to those of other countries but yields more or less the same results. In Chapter Six, Thomas F. Burke focuses on the Americans with Disabilities Act of 1990 (ADA), and its promise of helping U.S. economic competitiveness by bringing large numbers of disabled people into the workforce. Burke challenges the widely held view that the "rights" approach enforced by litigation is the only way to ensure compliance with this antidiscrimination law, claiming that it has led to uncertainty, delay, high transaction costs, and scattershot enforcement. Burke considers the European models of disability quotas and subsidies for employers hiring disabled people but dismisses them as a form of government intervention historically resisted in the United States. He then proposes the formation of a new disability agency with a broad mandate to enforce the ADA and subject to very limited judicial review.

As the authors repeatedly acknowledge, their essays tend to raise more questions than they answer. There is little credible empirical data on difficult topics such as the true cost of litigation, and scholars thus cannot yet reach unequivocal conclusions. The authors' frank discussions of controversial topics such as the ADA, however, serve to add strength and fervor to their arguments. Indeed, they seem unabashedly unafraid of seeming politically incorrect, and their proposed solutions buck conventional wisdom. The book does not claim to offer easy solutions, though; while it claims that the American system of legal adversarialism puts the nation at a competitive disadvantage, it also recognizes that American political traditions may be politically entrenched. This book is a valuable resource for anyone interested in an examination of the hidden costs of regulation and litigation and their implication for American economic competitiveness.